No. 12245

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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To the Honorable United States Court of Appeals for the Ninth Circuit:

This is an appeal from the District Court of the United States in and for the Southern District of California, Central Division, on a conviction of the appellant and a judgment of the Court thereon, under Count One of a three count indictment.

Jurisdiction.

Appellant was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on three counts. The first count charged a violation of United States Code, Title 21, Section 174 [T. R. p. 2]; the second count charged a violation of United States Code, Title 26, Section 2553(a); and in the third count a conspiracy to commit the offenses alleged in Counts One and Two [T. R. p. 3].

Statement of the Case.

After the first witness of the government was sworn and a question asked [T. R. pp. 6 and 54], the appellant attacked the sufficiency of the indictment by a motion to dismiss [T. R. pp. 5 and 6]. At the conclusion of the arguments on said motion, the Court overruled the objection to introduction of evidence on Count One and sustained the objection to the introduction of evidence on Counts Two and Three [T. R. p. 6]. (Attention is called to the fact that the Court did not dismiss Counts Two and Three, but merely forbade any evidence in proof of the material allegations thereof [Rep. Tr. pp. 50 and 53].)

Thereupon on appellant's motion for judgment of acquittal as to Counts Two and Three, the Court granted said motion [T. R. p. 6]. Then followed judgments of acquittals as to Counts Two and Three [T. R. p. 54]. The trial was had under Count One, resulting in appellant and a co-defendant being convicted under Count One, with an acquittal as to a third co-defendant [T. R. p. 7]. A motion for a new trial [T. R. p. 8] was filed by appellant and was denied [T. R. p. 14], and a motion for *non-obstante verdicto* was also denied [T. R. p. 15]. Thereafter due notice of appeal was filed from the judgment on April 13, 1949 [T. R. pp. 16 and 17].

This appeal is based upon appellant's five designated points on appeal [T. R. p. 57].

ARGUMENT.

Point I.

"Count One of the Indictment Does Not State Facts Sufficient to Constitute an Offense Against the Laws of the United States." [T. R. p. 57.]

The statute under which appellant suffered conviction read as follows:

> "If any person, *fraudulently or knowingly,* imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in doing so, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale, of any such narcotic drug after being imported or brought in, knowing the same to have been brought in contrary to law, etc." (Title 21, Sec. 174, U. S. C.) (Italics ours.)

The author of the indictment did not charge all of the acts prohibited by the section, but only the receipt, concealment and facilitating the transportation after importation of a certain drug * * * as the defendant then and there well knew had been imported into the United States contrary to law.

Such acts as the statute denounces shall be done *"fraudulently and knowingly."* Such acts that are here charged against appellant were not done "fraudulently and knowingly," for the reason that the count in question does not so charge.

It is axiomatic in criminal pleading that a criminal *scienter* shall be made to appear in the evidence if the

offense sought to be charged is not one *"malum per se."* In this case the criminal *scienter* is found in the words of the statute, "fraudulently and knowingly," and their omission is fatal to the count.

> "The words 'wilfully,' 'maliciously,' 'wilfully and maliciously,' or 'knowingly and wilfully,' etc., must be stated when they constitute part of the statutory definition of the offense."
>
> Am. Jur. Vol. 29, page 629, Sec. 67 (and cases cited).

The general rule on this proposition has been very succinctly stated in Corpus Juris Secundum, as follows:

> "As stated in Corpus Juris, which has been quoted and cited with approval, an indictment for an offense created by statute must be framed on the statute, and this fact must distinctly appear on the face of the indictment itself, and in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. The general rule is that the charge shall be so laid in the indictment or information as to bring the case precisely within the statute, alleging distinctly all the material facts and circumstances necessary to constitute the essential requisites of the offense."
>
> Corpus Juris Sec. Vol. 42, Sec. 137, page 1032.

Referring to pages 21 and 22 of the Transcript of Record, we find appellant's position adequately stated.

> "Directing Your Honor's attention to Count One of the indictment, Your Honor will see that it is laid under Title 21, Section 174.
>
> Title 21, Section 174, is predicated partly upon Title 21, Section 173. Title 21, Section 174, says

that if any person fraudulently or knowingly imports or brings into the United States—the indictment fails to set forth in any place in count 1 that any of these acts was done fraudulently or knowingly by either of the defendants.

The Court: Count 1 does. Count 1 is in several alternatives: 'If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory, or assists in so doing, or receives, conceals, buys, sells or in any matter facilitates the transportation, concealment or sale—'

Mr. Strong: It is our position the word 'fraudulently' or 'knowingly' applies to all of the alternatives.

The Court: That is correct. They have charged here that they did receive, conceal and facilitate the transportation after importation, and the last line says, 'The defendants well knew it had been imported into the United States of America contrary to law.

Those two are separate requirements of knowledge and the first requirement—

The Court: In other words, your position is they must knowingly conceal it.

Mr. Strong: They must fraudulently or knowingly receive, conceal or facilitate the transportation of it.

The Court: And the second is that they must know it was imported contrary to law.

Mr. Strong: Yes. And the statute itself in certain instances eliminates the knowledge as to the second part, in certain instances, by a presumption which is written into 174 but that only goes to the second part, as to the knowledge of it having been imported contrary to law.

But the offense that is actually charged here has to be alleged in the terms of the statute of having

been committed fraudulently or knowingly, the actual act, which is the offense of concealing."

The foregoing reference embodies the complaint of this appellant. On pages 48 *et seq.* of the Transcript will be found the ruling that held contrary to appellant's position. Counsel desires to point out in passing the language of the trial court on this score. The Court said:

> "I think if I were drawing the indictment, however, I would have put in 'did knowingly, unlawfully, willfully, feloniously, illegally' and so on and so forth 'received," but it isn't here." [T. R. p. 48.]

It has been held as a rule of construction that:

> "Criminal statutes must be strictly construed."
>
> *Tanner v. United States,* 128 F. 2d 970.

Alluding to the descriptive words which the trial court stated he would have inserted if he were drawing the indictment, we cite the following:

> "Allegations of essential elements of statutory offense are matters of substance and not of form, and their omission is not aided by verdict."
>
> *Harris v. U. S.,* 104 F. 2d 41,

and

> "Where guilty knowledge is a substantive ingredient of the offense it must be alleged."
>
> *United States v. Buzzo,* 85 U. S. 18, 21 L. Ed. 812.

In view of the above authorities, the "knowledge" of the defendant that he was receiving contraband, for whatever purpose, is a substantial and an essential ingredient of the offense and if one is accused of the offense under consideration without a sufficient allegation that he

possessed himself of the "drug" "knowingly" or "fraudulently," as the statute directs, the omission of such allegation is fatal. The courts have consistently held that even considering the indictment as a whole, or in all of its parts, cannot suffice to supply the needed language.

> "The rule that all parts of an indictment should be taken into consideration, and that indictment should be reasonably construed, does not warrant court in supplying needed language which is essential to a necessary element of the offense."
>
> *Mitchell v. U. S.,* 118 F. 2d 653.

Referring again to the language of the court on page 22, the expression, "The defendant well knew it had been imported into the United States contrary to law," omits the full reading of the matter.

In the language of Count 1 [Tr. p. 2], the expression "then and there" is included, making the full statement read:

> "The defendants then and there well knew, had been imported, etc."

We are thus faced with the situation where the trial court seeks to supply statutory elements (guilty *scienter*) to a count where such elements or ingredients are missing. The following is in point:

> "Where the charging part of an indictment for murder is in one sentence and the word 'feloniously,' used in relation to the assault, is so connected with the subsequent portion of the sentence as to modify them by a fair and reasonable interpretation, it is not necessary to repeat the word 'feloniously' in connection with each act necessary to constitute the crime, but if the pleader uses words to describe the

intent with which the mortal wound was inflicted, other than those used to charge the intent with which the assault was made, the words 'then and there' used in connecting the inflicting of the mortal wound with the felonious intent, will be interpreted to refer to time and place merely, and not as a vehicle to convey the intent with which the assault was made through the indictment so as to modify the intent in making the mortal wound."

Wright v. U. S., 90 Pac. 732, 18 Okla. 510, 11 Am. Cases, 994.

In line with reasoning set out in the *Wright* case (*supra*), the following authority from the Ninth Circuit is especially helpful:

In *Pon Wing Quong v. U. S.* (111 F. 2d 751 at 755), the point is there discussed. In the *Pon Wing Quong* case it was distinctly charged that the defendants "fraudulently and knowingly" did facilitate, etc. In the case at bar there is no direct *scienter* charged, as the statute directs, and the use of the expression "then and there well knew" cannot be relied on to supply the necessary *scienter.* In other words, the expression "then and there well knew," merely brings forward prior averments of date and venue, and do not otherwise enlarge the description of the offense.

Pon Wing Quong v. U. S., 111 F. 2d 751.

See also:

Shaw v. U. S., 165 Fed. 174.

It was indicated in the *Pon Wing Quong* case that there is no question but that in some instances this phrase would be held as a recital and not a sufficient allegation of fact, and that in the facts of the *Pon Wing Quong* case such an expression as alluded to did not so apply. However, in the case at bar we cite the *Pon Wing Quong* case as an authority in sustaining appellant's contention with regard to the allegations in Count 1 of the indictment. A further quotation from that case will be helpful:

> "The second count fails to allege directly any knowledge on the part of said defendants * * * that said opium had been imported into the United States contrary to law."

claiming that the phrase "as said defendants then and there well knew" is but a mere recital. There is no question but that in some instances this phrase would be held as a recital and not a sufficient allegation of fact, but we hold that this does not obtain in our case. The applicable part of the count is as follows:

> "That at the time and place mentioned in the first count, in Second Division and District, said defendants fraudulently and *knowingly* did facilitate the transportation of said load of smoking opium, in quantity particularly described as '250 cans containing approximately 165 ounces of smoking opium,' and said smoking opium had been imported into the United States contrary to law, *as said defendants then and there well knew.*" (Italics of the Court.)

Appellant's complaint is as much directed toward the reasoning of the trial court in sustaining the count as in the inherent weakness of the count itself [T. R. p. 48]. The following is noted from the record:

> "I think that the knowledge there applies to the knowledge that it was imported contrary to law, and if a person receives it and the indictment alleges that at the time and place they did receive, conceal and facilitate the transportation, and so forth, they did know it had been imported into the United States contrary to law." [T. R. pp. 48 and 49.]

The Court then adopts the concluding verbiage of the law to fabricate the receipt of the drug as fraught with the presumption of guilty knowledge. Note the further language of the Court:

> "Moreover, my conclusion in this respect is fortified by the last sentence in Section 174, because it says:
>
> > 'Whenever on trial for a violation of this Section, the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'
>
> Now, this charges that he did receive it, conceal it, and so forth. So if he received it and concealed it he must have possessed it and that depends on whether or not the evidence at the trial bears that out. But all I am dealing with now is the language of this indictment."

There can be no doubt that the Court was influenced in ruling the count good by the presumption of unlawful possession expressed in the concluding paragraph of the section. It is appellant's contention that the Court was in error in so ruling. The language, "Whenever on trial for a violation of this Section, etc.," very plainly has nothing whatever to do with the indictment under which the trial occurred. The trial mentioned wherein defendants' possession of the "drug" is presumed unlawful is an event having a previous valid indictment to warrant such a trial. The Court in passing on the validity of Count 1 gave to the latter paragraph an importance in interpreting the section that was plainly erroneous. Nowhere does the Court make plain the validity of the count with its omitted statutory terminology, save in the following language:

> *"The Court:* It says:
>
> 'Whenever on trial,' and I pointed out that may now show on the trial, but the indictment says that he did receive it and conceal it. Now, the receiving, and so forth, implies possession, so on the face of this indictment I am saying that this does not charge a crime because of that presumption. I am saying that this does charge a crime *because of that presumption,* which is contained in the statute, which merely fortifies the conclusion I urged concerning the first count." [T. R. pp. 49-50.]

From the foregoing it cannot be gainsaid but that the Court held Count 1 valid because of the "presumption" of

illegality attaching to appellant's possession of the "drug." The "presumption" alluded to does not come into existence except in a trial upon a valid indictment. It can play no part in construing the allegations of an accusatory instrument, yet the record shows that the trial court seized on that presumption and forced appellant to his trial for that reason alone, on a count that was fatally defective. In all cases, as we have pointed out, where an indictment is framed upon a statute, making a course of conduct a crime, the Supreme Court of the United States has very clearly held what the law is with respect to such an indictment.

> "We have no disposition to qualify what has been already frequently decided by this Court, that where a crime is a statutory one it must be charged with *precision and certainty,* and every ingredient of which it is composed must be *clearly and accurately* set forth, and that even in the case of misdemeanors the indictment must be free from all ambiguity and leave no doubt in the mind of the accused and the court of the exact offense intended to be charged."
>
> *Ledbetter v. U. S.,* 170 U. S. 606, 42 L. Ed. 1162 (and cases cited).

Point II.

That the Verdict of the Jury in This Matter Is in All Particulars Inconsistent and Illegal.

The argument that here follows will relate to Points 3, 4 and 5 of appellant's designated points on appeal [T. R. pp. 57-58].

As indicated in the record at page 6, the Court granted judgments of acquittal on Counts 2 and 3. The jury considered only Count 1 and found appellant and his co-defendant guilty thereunder [T. R. pp. 9-10].

We wish to point out that the Trial Court could have adopted one of different courses in disposing of appellant's attack on the indictment. It could have sustained the motion as made to suppress the evidence in support of Counts 2 and 3 and withdrew said counts from the consideration of the jury, or as an alternative, it could have granted the motion as made and dismissed the offending counts as not stating a public offense. Again, it could have limited the proof to the allegations of Count 1 without dismissing or otherwise bothering with Counts 2 and 3. The following incident from the record plainly indicates that the Court did not take any of the procedural steps set out above, but granted appellant a judgment of acquittal as to Counts 2 and 3. The record is here quoted:

> "Mr. Strong: At this point, your Honor, the defendant Shafer moves for the suppression of all evidence in the case, on the ground that the indictment does not state a public offense. We would like to argue the matter before your Honor.

The Court: You object to the introduction of any further evidence?

Mr. Strong: That is right.

The Court: What is it, a motion to suppress evidence or an objection to the introduction of further evidence?

Mr. Strong: An objection to the introduction of other evidence and also a motion for dismissal on the ground that the indictment does not state a public offense." [T. R. p. 20.]

As the record will indicate, an extended argument ensued, and on page 54 the action of the Trial Court with respect to the motions as made appears:

"Mr. Strong: At this time may we move for a judgment of acquittal as to Counts 2 and 3?

The Court: No, you may not—let me see. You have had a witness sworn and a question asked?

Mr. Strong: Yes, your Honor.

The Court: What is your position on that, Mr. Baugh?

Mr. Baugh: Well, if your Honor please, if the Court feels as the Court has ruled, I am unable to cogently argue that the motion is not well taken.

The Court: Very well. Each of the defendants will have a judgment of acquittal on the ground stated by the court as to Counts 2 and 3." [Tr. p. 54.]

It is appellant's contention that as soon as the Court below directed an acquittal on Counts 2 and 3, the appellant was in jeopardy as to Count 1 and his conviction thereunder and his sentence were without the powers of the Trial Court to impose. Conspiracy is a separate offense from the substantive offense for which it was

formed to commit. Proof of a conspiracy lies in the proof of the overt acts done or brought about to further the object of the criminal enterprise, and when a defendant is adjudged acquitted of overt acts that in themselves constitute the substantive offense of which he was found guilty, there is an inconsistency in the verdict and it should not be allowed to stand.

Count 3 of the indictment sets out [T. R. p. 4] the objects of the conspiracy, in that appellant was to deliver to one Fred Dauge the sum of $500.00, and said Dauge was to secure certain narcotic drugs in Mexico and transport the same to Los Angeles, California, and deliver the same to defendant, Milton Shafer. To effect the object of the conspiracy five overt acts are alleged, and in the overt acts we have the essential elements set out in Count 1 of the indictment, to wit: overt act No. 4 alleges that Fred Dauge delivered to Milton Shafer a key to a locker in the Union Station at Los Angeles, California, it elsewhere being charged that that was the method whereby the narcotic was to be concealed and its importation facilitated. As a matter of fact, we will quote from the language of Count 3 [T. R. p. 3]:

> "Prior to the commencement of the first overt act herein set forth and continuing to and including the date of the indictment, defendants Milton Theodore Shafer, Thomas Winfrey and Fred Earl Spelman did agree, confederate, and conspire, within the Central Division of the Southern District of California, to commit offenses against the United States, as follows: Knowingly to import and bring into the United States of America, and to aid and procure the importing and bringing into the United States of America from the Republic of Mexico, and to receive, conceal and facilitate the transportation and the con-

cealment after importation, of approximately 227 grains of heroin, in violation of United States Code Title 21, Section 174." [T. R. pp. 3 and 4.]

There we have Section 174 distinctly charged in the manner of its congressional enactment.

Had the Trial Court emasculated all the evidence attaching to the conspiracy count, there could have been no evidence whatsoever left to prove the elements of the crime set out in Count 1. Therefore, it is an inevitable conclusion, and under this state of the record appellant is entitled to a reversal of his conviction, and to his discharge in the premises, because it would be a fallacy to say that if he was not guilty of conspiring to commit the offense in Count 3, it would have been physically possible for him to have done the acts necessary to bring about his conviction under Count 1. If the appellant did not furnish $500.00 to witness Dauge to purchase narcotics in Mexico, then to that extent he did not receive any narcotics as charged in Count 1. Yet it is the same 227 grains of heroin that is mentioned in both counts.

The fact that supports appellant in this situation seems to be a complete ignoring of the effect of the acquittal rendered by the Court before the reception of evidence touching on the material allegations of Count 1 in the indictment.

An acquittal in legal parlance is a judicial determination of the fact of innocence. It is not a mere dismissal or other disposition of the matter. What brings the conviction of the defendant in this case under criticism is a

violation of that rule of law which forbids double jeopardy, and of course double jeopardy can be argued as an inconsistent verdict. Nevertheless, a case in point is as follows:

> "Congress has the power to create separate and distinct offenses growing out of the same act, but whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act."
>
> *Freeman v. U. S.,* 146 F. 2d 978.

A defendant cannot be acquitted under one count and convicted under another involving the same facts. This renders the verdict inconsistent. If the opinion of the *Freeman* case just cited is examined, its similarity to the case at bar is very apparent. Joint action was involved in that case, as here. Also, the same persons acting jointly in the substantive offenses were likewise accused in the commission of the overt acts of the conspiracy count. A similar situation governs the record before us. Count 3 of the indictment alleges that the concert of action was between Shafer, Winfrey and Spelman. It does not allege that such "concert of action" existed between these named and others unknown to the grand jury.

Counsel contends that as soon as the Court below directed an acquittal of Counts 2 and 3, the appellant was in jeopardy as to Count 1, and his conviction thereunder and his sentence were without the powers of the Trial Court to impose.

The better way to approach the problem confronting us in this matter is to state that since the evidence used was directed toward a joint action on the part of the defendants, such joint action cannot be used in a dual capacity, one to prove the substantive offense and the other to prove the conspiracy. The courts have consistently held that where such occur and convictions result, the argument of double punishment is made and is generally sustained. Count 2 of the indictment charges the purchase of the narcotics mentioned in the other counts. As to this count defendant Shafer was acquitted by the Court, and the effect of that acquittal like the acquittal in Count 3, was a judicial determination of the fact of innocence, and if this situation is given any merit whatever, counsel need but point to the fact of the indictment itself to establish the fact appellant was cleared of any unlawful purchase of the narcotic involved, and he likewise was cleared of any "concert of action" in regard to Counts 1 and 2.

The following authorities will sustain the appellant in his contention. The case of *Krench v. U. S.*, 42 F. 2d 354 (Note) (Referring to *United States v. Reynolds,* 282 Fed. 256):

> "That although it is competent for Congress to create separate and distinct offenses growing out of the same transaction, where it is necessary in proving one offense to prove every essential element of another growing out of the same act, a conviction of the former is a bar to a prosecution for the latter."

Also, in the case of *Tritico v. U. S.*, 4 F. 2d 664, on the question of jeopardy, cites with approval *Morey v. Commonwealth* (108 Mass. 433), in which it was said:

> "A conviction or acquittal upon one indictment is no bar to a subsequent conviction, and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. *The test is not whether the defendant had already been tried for the same act, but whether he has been put in jeopardy for the same offense.* A single act may be an offense against two statutes, and if one statute requires proving an additional fact which the other does not, an acquittal or conviction does not exempt defendant from prosecution and punishment under the other."

Applying the principle from the decision just cited, it is readily seen that this appellant in securing his acquittal as to Count 2 and Count 3, was acquitted thereof and thereby of each and every fact necessary to prove the violation of the offense delineated in Count 1. The same drug is involved and the same defendants are implicated. There is no one fact requiring proof under Count 1 that would be at all foreign to the proof of either Count 2 or Count 3, and as a consequence, appellant's conviction not only amounted to an inconsistent verdict, but one that was in violation of his constitutional rights not to be placed in jeopardy twice for the same offense.

The principle that has been argued at length finds ample support throughout the decisions, and it cannot be attacked

simply because the inconsistency of the verdict or the jeopardy occurred in the same action. At this point we cite the case of *Burton v. U. S.* (202 U. S. 344, 50 L. Ed. 1057):

> "If the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact, quoting with approval in Bishop's Criminal Law that: 'The jeopardy is not the same when the two indictments are so diverse as to preclude the same evidence from sustaining both.'"

And it was also held in *In re Nielson* (131 U. S. 176, 33 L. Ed. 118), holding in effect the same and stating also that it makes no difference if the prosecution is held at the same or different time.

> "It can make no difference whether separate charges are tried together or at different times."

Counsel is not unmindful of the fact that the argument here made can be attacked upon the ground that it was the defendant's fault that invoked the action of the Court in pronouncing the judgment of acquittal. It will be conceded that under certain circumstances a defendant cannot be allowed to take advantage of his own conduct. As an example, he will be prevented from pleading former jeopardy upon a successful determination of an appeal prosecuted by him from a conviction. We pointed out in the inception of the argument here that the defendant merely moved to suppress the evidence upon all counts under the indictment for the reason that the indictment did not state facts sufficient to constitute a violation of the law.

It was possible for the Court in its position as the sole judge of the law, to have ruled as we have pointed out in instances other than the manner disclosed. Because the Court so ruled cannot be laid at the door of the appellant. This situation was illustrated in the case of *United States v. Kraut* (2d Fed. Supp. 16), wherein the Court touched upon a situation similar to the one at hand and held:

> "In the instant case, however, the withdrawal of the eight counts from the consideration of the jury at the second trial can hardly be claimed to be actuated by any necessity, urgent or otherwise. In the language of the presiding judge, it was done * * * purely as a matter of expediency.
>
> From that point of view there may have been ample justification for the action of the court, but the fact that there was such justification from such a point of view is not adequate to countervail the plea of former jeopardy subsequently made by counsel for defendant."

We feel, therefore, that the reasoning in the *Kraut* case above set out enables this appellant to state that the judgments of acquittal contained in this record are not at par with mere judgments of dismissal or mere motions to suppress the evidence, but it was jeopardy in its broadest legal sense, and the Court in granting the judgments of acquittal before the receipt of the entire evidence, was erroneous, and amounted to not only former jeopardy, but double jeopardy.

In the case of *Louis v. U. S.* (218 Fed. 36), a plea of former jeopardy was not allowed due to additional charge of "aiding and abetting," not involved in former trial of conspiracy. Aiding and abetting a crime is a distinct offense under act of Congress. And also:

> "In determining whether same offense is charged in two counts of an indictment or in two indictments consolidated for trial, so that acquittal on one offense will bar a conviction on the other, test is whether the same evidence will support both counts."
>
> *Hughes v. U. S.*, 95 F. 2d 538.

Also:

> *Schmeller v. U. S.*, 143 F. 2d 544.

To properly test the validity of the acquittals contained in this record, and omitting any reference to the validity or invalidity of Count 1, but assuming for the sake of argument that a retrial will be ordered under that count, the question then would arise, can the defendant be placed on his trial with respect to Counts 2 and 3, if the judgments of acquittal are not sufficient determinations of innocence as to bar future prosecutions? It is well known that a defendant can be retried upon a count that is merely dismissed, for under such a situation the defendant is not placed in jeopardy. We are not contending for such a record here. So, therefore, if the defendant cannot be placed on trial in the future for the offenses enumerated in Counts 2 and 3, then his innocence therein and thereunder has been determined, and in that fact lies the merit of his contention upon this appeal that he was placed in jeopardy as to Count 1.

Point III.

That Appellant Was Placed in Jeopardy as to Count I of the Indictment for the Reason That Said Count One Does Not Contain an Element That Is Not Involved in Counts Two and Three of Said Indictment, and for That Reason the Verdict in This Case Amounts to Double Jeopardy.

As has heretofore been stated, the argument set out in Point II of this brief relates to this Point, and for the sake of brevity, is reiterated and repeated in full as to this Point III with the same force and effect as though fully set out herein.

Point IV.

That the Concert of Action Implied in Count Three of the Indictment Is the Same Concert of Action Implied in Count One and Appellant's Acquittal Under Count Three Entitled Him to an Acquittal Under Count One, and the Court Was in Error in Denying Appellant's Motion for a New Trial, and Motion for Judgment Notwithstanding the Verdict.

As has heretofore been stated the argument set out in Point II of this brief relates to this point, and for the sake of brevity, is reiterated and repeated in full as to this Point IV with the same force and effect as though fully set out herein.

Point V.

The Narcotic Alleged in Counts Two and Three Being the Same Narcotic Alleged in Count One, Judgment of Acquittal Under Counts Two and Three Is, in Its Legal Effect, an Acquittal of Appellant From Knowingly and Fraudulently Receiving, Concealing, Having in His Possession, Purchasing, and Facilitating the Transportation and Concealment After Importation of the Said Narcotic Contrary to Law.

As has heretofore been stated, the argument set out in Point II of this brief relates to this point, and for the sake of brevity, is reiterated and repeated in full as to this Point V with the same force and effect as though fully set out herein.

It is therefore respectfully urged that the conviction of the appellant be reversed, and he be ordered discharged.

MAX TENDLER,
Attorney for Defendant and Appellant,
Milton Theodore Shafer.